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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Case No:

FERNANDO GASTELUM,

Plaintiff,

vs.

8617 BLACK CANYON HIGHWAY
LLC, d/b/a Budget Lodge

Defendant(s).

VERIFIED COMPLAINT

- 1. Americans with Disabilities Act**
- 2. Negligence**
- 3. Negligent Misrepresentation**
- 4. Failure to Disclose**
- 5. Fraud / Consumer Fraud**

JURY TRIAL REQUESTED

INTRODUCTION

1. Plaintiff brings this action pursuant to the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.* and corresponding regulations, 28 CFR Part 36 and Department of Justice Standards for Accessible Design (“ADA”).
2. Plaintiff’s left leg is amputated below the knee. Plaintiff moves with the aid of a wheelchair or a prosthetic leg. Plaintiff suffers from a disability as this term is defined in 42 U.S.C. 12102 and 28 CFR §36.105 (c)(1)(i) which includes, inter alia, “walking, standing, sitting, reaching, lifting [and] bending” and other

1 activities. A partial missing limb “substantially limit[s] musculoskeletal
2 function” as a matter of law. 28 CFR § 36.105 (d)(2)(iii)(D).

3
4 3. Plaintiff is constantly and relentlessly segregated and discriminated against,
5 excluded, denied equal services, or otherwise treated differently than other
6 individuals because of his disability, and has been denied the opportunity to
7 participate in or benefit from services, facilities and opportunities available
8 people without disabilities.

9
10 4. Plaintiff incorporates herein Congressional Findings and Purpose set forth in 42
11 U.S.C. §12-101 and 28 CFR §36.101.

12
13 5. Plaintiff is being subjected to discrimination on the basis of disability in
14 violation of Subchapter III of the Americans with Disabilities Act or has
15 reasonable ground to believe that that he is about to be subjected to
16 discrimination in violation of 42 U.S.C. §12183.

17
18 6. Plaintiff alleges that he has actual notice that Defendant has failed to comply
19 with Subchapter III of the ADA, 28 CFR 36 and the 2010 Standards of
20 Accessibility Design (“2010 Standards”) as more fully alleged below.

21
22 7. Plaintiff alleges that he has no obligation to engage in futile gestures as
23 referenced in 42 U.S.C. §12188(A)(1) and 28 C.F.R. Subpart E

24
25 8. Defendant has discriminated against Plaintiff by the following actions and
26 failures to act –
27
28

- a. Failing to make reasonable modifications in policies, practices, or procedures which are necessary to afford Plaintiff and others similarly situated accessibility to Defendant's place of public accommodation, thus violating 42 U.S.C. §12182(b)(2)(A)(ii) and 28 C.F.R. §36.302(a); and
- b. Failing to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, thus violating 42 U.S.C. §12182(b)(2)(A)(iii); and
- c. Failing to remove architectural barriers where such removal is readily achievable, thus violating 42 U.S.C. §12182(b)(2)(A)(iii), 28 CFR 36 and the 2010 Standards..

PARTIES

9. Plaintiff is a disabled person and a committed individual to advance the time when places of public accommodations will be compliant with the ADA.
10. Plaintiff's disability includes the amputation of the left leg below the knee. Plaintiff moves with the use of a wheelchair, walker and/or a prostethis.
11. Defendant 8617 BLACK CANYON HIGHWAY LLC, d/b/a Budget Lodge owns and/or operates hotel at 8617 North Black Canyon Highway, Phoenix, Arizona which is a public accommodation pursuant to 42 U.S.C. § 12181(7)(A) which offers public lodging services *See* 28 CFR §36.104 and a listing of public accommodations in 42 U.S.C. §12181(7).

JURISDICTION

12. District Court has jurisdiction over this case or controversy by virtue of 28 U.S.C. §§ 28-1331 and 42 U.S.C. § 12188 and 28 U.S.C. § 1367.

1 13.Plaintiff brings this action as a private attorney general who has been personally
2 subjected to discrimination on the basis of his disability, *see* 42 U.S.C.12188
3 and 28 CFR §36.501.

4 14.Venue is proper pursuant to 28 U.S.C. § 1391.

5 **STANDING TO SUE JURISDICTION**

6 15.Plaintiff intends to book a room at the Defendant's hotel once Defendant has
7 removed all accessibility barriers, including the ones not specifically referenced
8 herein, and has fully complied with the ADA.

9 16. Because of Defendant's denial of Plaintiff's use and enjoyment of a critical
10 public accommodation through Defendant's acts of discrimination and
11 segregation, he is deterred from visiting that accommodation by accessibility
12 barriers and other violations of the ADA.

13 17.Defendant has denied Plaintiff -

14 a. The opportunity to participate in or benefit from the goods, services,
15 facilities, privileges, advantages, or accommodations at its hotel.

16 b. The right to be included in the population at large who benefits from
17 Defendant's hotel without being segregated because his disability.

18 18.Plaintiff intends to book a room at Defendant's hotel in the future but he will
19 likely suffer repeated injury unless and until the barriers of accessibility and
20 ambulatory and wheelchair accessibility barriers have been removed.

21 **CONTINUING JURISDICTION**

22 19.ADA violations which form the subject matter of this Verified Complaint
23 change frequently due to regular maintenance, remodels, repairs, and normal
24 wear and tear.

25 20.Defendant's ADA Violations are of the type that can reasonably be expected to
26 start up again, allowing Defendant to be free to return to the old ways' after the
27 threat of a lawsuit had passed.

1 21.If one or more ADA violation are cured, Plaintiff alleges that they were cured
2 and timed to anticipate the current lawsuit, and not as a good faith effort to
3 comply with the ADA.

4 22.To remedy the violations of 28 CFR 36.302(e), Defendant would be required to
5 adopt policies and regulations regarding a truthful disclosure of accessibility
6 elements pursuant to 28 CFR §36.302(e).

7
8 **COUNT ONE**

9 Violation of Plaintiff's Civil Rights under the ADA

10 23.Plaintiff realleges all allegations heretofore set forth.

11 24.By virtue of his disability, Plaintiff requires an ADA compliant lodging facility
12 particularly applicable to his mobility, both ambulatory and wheelchair assisted.

13 25.Plaintiff called Defendant's hotel to book a room and spoke with Anna Lee.

14 26.Plaintiff inquired whether a wheelchair room was available for one night.

15 27.Anna Lee responded that the hotel has only 2 accessible rooms but that none
16 were available.

17 28.The hotel has 178 rooms.

18 29.Plaintiff inquired whether the rooms and the hotel were compliant with the
19 ADA.

20 30.Reservations clerk responded that the hotel was compliant with the Americans
21 with Disabilities Act.

22 31.Plaintiff subsequently visited the hotel to independently verify that it was, at
23 least on the outside, suitable to accommodate his disability.

24 32.Plaintiff noted that the hotel was not compliant with the ADA and was replete
25 with accessibility barriers in the details which include, without limitation, the
26 following areas of non-compliance:

- 27 a. Accessible parking is not the closest to the accessible route; and
28 b. Accessible parking crosses the lanes of vehicular traffic; and

- c. Accessible parking is not dispersed; and
- d. Accessible parking does not have required signage; and
- e. There is an inadequate number of accessible parking spot; and
- f. Accessible parking does not have a van accessible space; and
- g. Drop off zone is not compliant with the 2010 Standards of Accessibility Design by not being properly marked; and
- h. The drop off zone is not accessible and is located on a slope visually greater than 1:48; and
- i. Multiple access points to the accessible routes do not have curb ramps; and
- j. Stairways are non-compliant by virtue of improper handrails; and
- k. Stairways are not compliant by virtue of improper nosings; and
- l. Numerous curb ramps have inadequate flair sides; and
- m. Multiple accessible routes are visually improperly sloped; and
- n. Improper changes in level on curb ramps; and
- o. Protruding objects on accessible routes; and
- p. Inaccessible patio; and
- q. Hotel has inadequate number of accessible rooms; and
- r. Other matters to be discovered through the litigation process.

33. As a result of the deficiencies described above, Plaintiff declined to book a room at the hotel.

34. The removal of accessibility barriers listed above is readily achievable.

35. As a direct and proximate result of ADA Violations, Defendant's failure to remove accessibility barriers prevented Plaintiff from equal access to the Defendant's public accommodation.

WHEREFORE, Plaintiff prays for all relief as follows:

A. Relief described in 42 U.S.C. §2000a – 3; and

B. Relief described in 42 U.S.C. § 12188(a) and (b) and, particularly -

1 C. Injunctive relief order to alter Defendant's place of public
2 accommodation to make it readily accessible to and usable by ALL
3 individuals with disabilities; and

4 D. Requiring the provision of an auxiliary aid or service, modification of a
5 policy, or provision of alternative methods, to the extent required by
6 Subchapter III of the ADA; and

7 E. For costs, expenses and attorney's fees; and

8 F. All remedies provided for in 28 C.F.R. 36.501(a) and (b).
9

10 **COUNT TWO**

11 Negligence

12 36.Plaintiff realleges all allegations heretofore set forth.

13 37.Defendant had a duty to Plaintiff to remove ADA accessibility barriers so that
14 Plaintiff as a disabled individual would have full and equal access to the public
15 accommodation.

16 38.Defendant breached this duty.

17 39.Defendant is or should be aware that, historically, society has tended to isolate
18 and segregate individuals with disabilities, and, despite some improvements,
19 such forms of discrimination against individuals with disabilities continue to be
20 a serious and pervasive social problem¹.

21 40.Defendant knowingly and intentionally participated in this historical
22 discrimination against Plaintiff, causing Plaintiff damage.

23 41.Discrimination against individuals with disabilities persists in the use and
24 enjoyment of critical public accommodations².
25
26

27 ¹ 42 U.S.C. § 12101(a)(2)

28 ² 42 U.S.C. §12101(a)(3)

1 42. Defendant's knowing and intentional persistence in discrimination against
2 Plaintiff is alleged, causing Plaintiff damage.

3 43. Individuals with disabilities, including Plaintiff, continually encounter various
4 forms of discrimination, including outright intentional exclusion, the
5 discriminatory effects of architectural, overprotective rules and policies, failure
6 to make modifications to existing facilities and practices, exclusionary
7 qualification standards and criteria, segregation, and relegation to lesser
8 services, programs, activities, benefits, jobs, or other opportunities³.

9 44. Defendant's knowing and intentional discrimination against Plaintiff reinforces
10 above forms of discrimination, causing Plaintiff damage.

11 45. Census data, national polls, and other studies have documented that people
12 with disabilities, as a group, occupy an inferior status in our society, and are
13 severely disadvantaged socially, vocationally, economically, and
14 educationally⁴.

15 46. Defendant's knowing and intentional discrimination has relegated Plaintiff to
16 an inferior status in society, causing Plaintiff damage.

17 47. The Nation's proper goals regarding individuals with disabilities are to assure
18 equality of opportunity, full participation, independent living, and economic
19 self-sufficiency for such individuals⁵.

20 48. Defendant's knowing and intentional discrimination has worked counter to our
21 Nation's goals of equality, causing Plaintiff damage.

22 49. Continued existence of unfair and unnecessary discrimination and prejudice
23 denies people with disabilities the opportunity to compete on an equal basis and
24 to pursue those opportunities for which our free society is justifiably famous,
25

26 ³ 42 U.S.C. §12101(a)(5)

27 ⁴ 42 U.S.C. §12101(a)(6)

28 ⁵ 42 U.S.C. §12101(a)(7)

1 and costs the United States billions of dollars in unnecessary expenses resulting
2 from dependency and nonproductivity⁶.

3 50. Defendant's knowing and intentional unfair and unnecessary discrimination
4 against Plaintiff demonstrates Defendant's knowing and intentional damage to
5 Plaintiff.

6 51. Defendant's breach of duty caused Plaintiff damages including, without
7 limitation, the feeling of segregation, discrimination, relegation to second class
8 citizen status the pain, suffering and emotional damages inherent to
9 discrimination and segregation and other damages to be proven at trial.

10 52. By violating Plaintiff's civil rights, Defendant engaged in intentional,
11 aggravated and outrageous conduct.

12 53. The ADA has been the law of the land since 1991, but Defendant engaged in a
13 conscious action of a reprehensible character, that is, Defendant denied Plaintiff
14 his civil rights, and cause him damage by virtue of segregation, discrimination,
15 relegation to second class citizen status the pain, suffering and emotional
16 damages inherent to discrimination and segregation and other damages to be
17 proven at trial

18 54. Defendant either intended to cause injury to Plaintiff or defendant consciously
19 pursued a course of conduct knowing that it created a substantial risk of
20 significant harm to Plaintiff.

21 55. Defendant is liable to Plaintiff for punitive damages in an amount to be proven
22 at trial sufficient, however, to deter this Defendant and others similarly situated
23 from pursuing similar acts.

24 **WHEREFORE**, Plaintiff prays for relief as follows:

25 A. For finding of negligence; and

26 B. For damages in an amount to be proven at trial; and

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⁶ 42 U.S.C. §12101(a)(8)

1 C. For punitive damages to be proven at trial; and

2 D. For such other and further relief as the Court may deem just and proper.

3
4 **COUNT THREE**
5 Negligent Misrepresentation

6 56.Plaintiff realleges all allegations heretofore set forth.

7 57.Defendant failed to exercise reasonable care or competence in obtaining or
8 communicating the information regarding ADA compliance to Plaintiff
9 telephonically.

10 58.Defendant hotel supplied false information to Plaintiff for guidance in
11 Plaintiff's business transaction, to wit: the renting of a hotel room.

12 59.Defendant's false statement was made in the course of Defendant's business in
13 which Defendant has a pecuniary interest, to wit: renting of rooms.

14 60.Plaintiff justifiably relied on Defendant's false information.

15 61.Plaintiff has suffered pecuniary losses as a result of his reliance on Defendant's
16 false information regarding ADA compliance, to wit: he spent time, effort and
17 resources independently verifying Defendant's telephonic statements.

18 62.Defendant either intended to cause injury to Plaintiff or defendant consciously
19 pursued a course of conduct knowing that it created a substantial risk of
20 significant harm to Plaintiff.

21 63.Defendant is liable to Plaintiff for punitive damages in an amount to be proven
22 at trial sufficient, however, to deter this Defendant and others similarly situated
23 from pursuing similar acts.

24 **WHEREFORE**, Plaintiff prays for relief as follows:

25 A. For finding of negligent misrepresentation; and

26 B. For damages in an amount to be proven at trial; and

27 C. For punitive damages to be proven at trial; and

28 D. For such other and further relief as the Court may deem just and proper.

COUNT FOUR
Failure to Disclose

64.Plaintiff realleges all allegations heretofore set forth.

65.Defendant was under a duty to Plaintiff to exercise reasonable care to disclose matters required to be disclosed pursuant to 28 CFR 36.302(e) as more fully alleged above.

66.Defendant was under a duty to disclose matters to Plaintiff that Defendant knew were necessary to be disclosed to prevent Plaintiff to be misled by partial disclosures of ADA compliance as more fully alleged above.

67.The compliance with the ADA is a fact basic to the transaction.

68.Defendant failed to make the necessary disclosures.

69.As a direct consequence of Defendant's failure to disclose, Plaintiff visited the hotel, but did not book a room because of its non-compliance with the ADA.

70.Plaintiff has been damaged by Defendant's non-disclosure.

71.Defendant either intended to cause injury to Plaintiff or defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to Plaintiff.

72.Defendant is liable to Plaintiff for punitive damages in an amount to be proven at trial sufficient, however, to deter this Defendant and others similarly situated from pursuing similar acts.

WHEREFORE, Plaintiff prays for relief as follows:

A. For finding of that Defendant failed to disclose information; and

B. For damages in an amount to be proven at trial; and

C. For punitive damages to be proven at trial; and

D. For such other and further relief as the Court may deem just and proper.

COUNT FIVE

Fraud

Common Law and Consumer

73.Plaintiff realleges all allegations heretofore set forth.

74.Defendant made a representation as alleged above.

75.The representation was material.

76.The representation was false.

77.The representation was material.

78.Defendant knew that the representation was false or was ignorant to the truth or falsity thereof.

79.Defendant intended that Plaintiff rely on the false representation.

80.Plaintiff reasonably relied on the misrepresentation.

81.Plaintiff has a right to rely on the misrepresentation.

82.Plaintiff was consequently and proximately damaged by Defendant's misrepresentation.

83.Defendant's misrepresentation was made in connection with the sale or advertisement of merchandise with the intent that Plaintiff rely on it.

84.Renting of hotel rooms is "merchandise" as this term is defined in A.R.S. §44-1521(5).

85. Plaintiff relied on the misrepresentation.

86.Plaintiff suffered an injury resulting from the false misrepresentation

87.Defendant either intended to cause injury to Plaintiff or defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to Plaintiff.

88.Defendant is liable to Plaintiff for punitive damages in an amount to be proven at trial sufficient, however, to deter this Defendant and others similarly situated from pursuing similar acts.

WHEREFORE, Plaintiff prays for relief as follows:

- 1 A. For finding of that Defendant failed to disclose information; and
2 B. For damages in an amount to be proven at trial; and
3 C. For punitive damages to be proven at trial; and
4 D. For such other and further relief as the Court may deem just and proper.
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6 **REQUEST FOR TRIAL BY JURY**

7 Plaintiff respectfully requests a trial by jury in issues triable by a jury.

8 DATED this 8th day of August 2017.

9 **STROJNIK, P.C.**

10 

11 _____
12 Peter Strojnik, 6464
13 Attorneys for Plaintiff

14 **VERIFICATION**

15 Plaintiff verifies that he has read the forgoing and that the factual allegations stated above
16 are true and correct to the best of his knowledge, information and belief. Plaintiff makes
17 this verification under the penalty of perjury.

18 /s/ Fernando Gastelum
19 Authorized Electronically
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